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13 Stephen Fairfax and MTechnology

14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 SWITCH, LTD.,
17 a Nevada limited liability company,

18 Plaintiff,
19 vs.

20 STEPHEN FAIRFAX; MTECHNOLOGY;
21 DOES 1 through 10; and ROE ENTITIES 11
22 through 20, inclusive,

23 Defendants.

24 Case No.: 2:17-cv-2651

25 **DEFENDANTS' REQUEST FOR A PRETRIAL
26 CONFERENCE AND SUBMISSION OF
27 PROPOSED PROTECTIVE ORDER**

1 **DEFENDANTS' REQUEST FOR A PRETRIAL CONFERENCE AND SUBMISSION OF**
2 **PROPOSED PROTECTIVE ORDER**

3 Defendants Stephen Fairfax and MTechnology hereby request that this
4 Court conduct a pretrial conference with respect to the parties' competing
5 proposed Protective Orders pursuant to LR 16-2. Counsel for the parties are unable
6 to agree upon certain provisions of the Protective Order, and Defendants have
7 concerns regarding the ways Plaintiff intends to use documents that Defendants
8 designate as "Highly Confidential." For this Court's convenience, Defendants'
9 proposed Protective Order is attached hereto as **Exhibit A**.

10 The parties have conducted at least two meet and confer conferences (on
11 August 23, 2019 and August 29, 2019)¹ with general counsel for Switch, Ltd.
12 ("Switch") to attempt to resolve their dispute. (See Declaration of Ronald Green,
13 at ¶ 4. Attached hereto as **Exhibit B**.) Neither conference was successful at
14 resolving the parties' differences with respect to the language of the eventual
15 Protective Order in this case. (See *id.* at ¶ 5.) Court intervention is required.

16 Regarding Defendants' concerns regarding Switch's use of documents
17 obtained in discovery, the majority of the documents Plaintiff Switch is requesting
18 in this litigation are sensitive documents containing the trade secrets and detailed
19 design information of its biggest competitors. Switch has already informed
20 Plaintiffs and their counsel that it intends to use discovery in this case for the
21 improper purpose of "patent litigation" against at least one of those competitors.
22 The rest of the information about other competitors appears to be an attempt to
23 use the discovery process in lieu of industrial espionage.

24
25 ¹ Defendants' counsel has additionally engaged in at least two discussions regarding the
26 Protective Order with Piers Tueller, an attorney with Hutchison & Steffan that Switch has hired to
27 interface with Defense counsel on discovery issues but will apparently not be appearing in this
case. Because he has not made an appearance, Defense counsel has asserted that Mr. Tueller
does not have the ability to conduct meet and confer conferences as required by this Court's
rules.

1 Switch should not be permitted to use discovery in this case to either fish for
2 claims against third parties or to simply gain trade secrets that it could not
3 otherwise obtain.

4 Switch additionally insisted upon editing the categories of documents that
5 Defendants may choose to designate as "Highly Confidential." Among the
6 documents that Switch insists Defendants cannot designate as "Highly
7 Confidential" are documents that Defendants created or received pursuant to
8 non-disclosure agreements. Again, many of these documents relate to Switch's
9 primary competitors, and Defendants are convinced (by Switch's own words)
10 that Switch intends to use them for improper purposes not related to this litigation.

11 Switch has not been shy about its intent to use documents obtained in
12 discovery in this case against its competitors. It refused to include language in the
13 Protective Order that the parties are not allowed to use "Confidential" or "Highly
14 Confidential" material "to compete with the other Party or any third party" or "to
15 damage a Party's relationship with any third party" or "to gain a competitive
16 advantage over the other Party... or any third party." (See Defendants' Proposed
17 Protective Order, attached as Exhibit A.) Moreover, the draft Protective Order it
18 submitted to this Court openly acknowledges that Switch is using this case to
19 obtain information about Aligned Data Centers, one of its primary competitors –
20 which is not a party to this litigation. Switch previously filed suit against Aligned
21 Data Centers in the U.S. District Court for the Eastern District of Texas. That action
22 was dismissed with prejudice, leaving this suit as Switch's only way to obtain
23 information about Aligned's data centers – but with its claims dismissed with
24 prejudice, it is unclear why Switch would even *logically* be able to defend its
25 desire to delve into Aligned's trade secrets. It most cannot justify this *legally*.

26 During a meet and confer conference held between Sam Castor, counsel
27 for Switch, and Marc Randazza and Ronald Green, counsel for Defendants, on

1 August 29, 2019, Mr. Castor said on two separate occasions that Switch needed
2 discovery in this case to “substantiate” its “anticipated claims” ~~ef~~ against Aligned.
3 (See *id.* at ¶ 6.) When Defense counsel informed him that it was improper for him
4 to use discovery in this case to target third parties, Mr. Castor attempted to justify
5 Switch’s intentions by misrepresenting that Switch had dismissed its claims against
6 Aligned without prejudice and that it was refiling its suit against Aligned shortly.
7 (See *id.* at ¶ 7.) In fact, all of the claims in that case were dismissed with prejudice.
8 (See Order dismissing Case No. 2:17-CV-574-JRG, attached as **Exhibit C.**)

9 In any event, if Switch wishes to sue Aligned (or any other party) the way
10 to do that is to sue that third party and seek discovery in that action. Federal
11 claims against Defendants are not to be used as a quasi “pure bill of discovery”
12 action against another party. However, the fact that Switch is admitting to this
13 abuse of process seems to illuminate the reason that this action was filed in the
14 first place. This is ostensibly a trade secret case – yet after nearly two years since
15 the filing of this case, Defendants have yet to learn precisely what trade secrets
16 were allegedly misappropriated.

17 LR 16-2 permits any party to request a pre-trial conference to expedite
18 disposition of any case. Here, the parties have been discussing the language of
19 a Protective Order for approximately two months. With a deadline for expert
20 discovery approaching in October of 2019, the parties need to resolve this issue,
21 and Defendants request that they be given the opportunity to discuss their issues
22 with Switch’s proposed Protective Order prior to the Court’s ruling upon which of
23 the competing Protective Orders will control discovery in this case.

24 Dated: September 3, 2019.

25 Respectfully submitted,

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/s/ Marc J. Randazza

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Case No. 2:17-cv-2651

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via electronic mail and U.S. Mail to the attorneys listed below:

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Respectfully Submitted,

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